

200304tartaglioneC Conference

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x
UNITED STATES OF AMERICA

3 v.

16 Cr. 832 KMK

4 NICHOLAS TARTAGLIONE,

5 Defendant.

6 -----x

7 United States Courthouse
8 White Plains, N.Y.
9 March 4, 2020
2:10 p.m.

10 Before:

11 THE HONORABLE KENNETH M. KARAS,

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN
United States Attorney for the
15 Southern District of New York
MAURENE COMEY and JASON SWERGOLD
16 Assistant United States Attorneys

17 BRUCE BARKET
AIDA LEISENRING
18 ANTHONY L. RICCO
JOHN DIAZ
19 MICHAEL BACHRACH and
BRUCE KOFFSKY
20 Attorneys for Defendant Nicholas Tartaglione

21 ALSO PRESENT: BOBBI C. STERNHEIM, Curcio Counsel
DAVID RUHNKE, Resource Counsel
22 TANYA GREENE, Resource Counsel

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1 (In open court)

2 THE DEPUTY CLERK: In the matter of the United States
3 of America v. Nicholas Tartaglione.

4 Counsel, please state your appearances for the
5 record.

6 MR. SWERGOLD: Good afternoon, your Honor. Jason
7 Swergold and Maurene Comey for the government. We also have
8 Assistant US Attorneys Margery Feinzig with respect to the
9 *Curcio* issue and AUSA Thomas John Wright with respect to the
10 contraband cellphone privilege issue. He's the wall assistant
11 on that, your Honor.

12 THE COURT: I understand.

13 MR. SWERGOLD: Thanks.

14 THE COURT: Good afternoon to you all.

15 MS. COMEY: Good afternoon, your Honor.

16 MR. BARKET: I think they're just trying to catch up
17 to our numbers.

18 THE COURT: Yes.

19 MR. BARKET: Bruce Barket and Aida Leisenring for
20 Mr. Tartaglione.

21 MR. RICCO: Anthony Ricco, a little under the
22 weather, but here. And I just want to note at the back table
23 we have Resource Counsel David Ruhnke, and we also have
24 Resource Counsel Tanya Greene, who has been with the case since
25 the beginning, but I think this may be her first appearance

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1 here.

2 THE COURT: Welcome.

3 MR. RICCO: And of course, *Curcio* counsel Bobbi
4 Sternheim.

5 MS. STERNHEIM: Good afternoon.

6 MR. DIAZ: John Diaz appearing for Nicholas
7 Tartaglione.

8 MR. BACHRACH: Michael Bachrach, also under the
9 weather, here for the defendant.

10 MR. KOFFSKY: Good afternoon, your Honor. Bruce
11 Koffsky.

12 THE COURT: Not under the weather?

13 MR. KOFFSKY: Not.

14 THE COURT: Not yet.

15 MR. KOFFSKY: Fit as a fiddle.

16 THE COURT: Under the weather has a whole new meaning
17 these days. Good afternoon. Please be seated, everybody.

18 I don't even know where to begin. So I guess we'll
19 just see if there's any plain vanilla updates from the
20 government and go from there.

21 MR. SWERGOLD: If you're looking for the plain
22 vanilla updates, I guess I would say, recognizing the
23 outstanding *Curcio* issue and that everything is being held in
24 abeyance, for the record, the government is requesting a trial
25 and we request a trial date.

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1 Putting that aside, we've asked AUSA Wright to be
2 here because although we do not know the substance of it, we
3 understand there may be some dispute regarding what, if any,
4 portions of the contraband cellphone can be shared with the
5 trial team, so there's that issue.

6 There's obviously the *Curcio* issue, and that's, from
7 the government's perspective, those are the only items we're
8 aware of that we need to affirmatively raise.

9 THE COURT: So there's been no discovery developments
10 or anything of the kind?

11 MR. SWERGOLD: Nothing related to -- I can't remember
12 if we produced anything after the last conference. Certainly,
13 within the last two months, there's been some discovery
14 produced with respect to penalty phase requests. Nothing with
15 respect to any guilt phase evidence.

16 THE COURT: Okay. All right. Thank you.

17 Mr. Barket.

18 MR. BARKET: Ours aren't vanilla.

19 THE COURT: Sorry?

20 Then turning to the other issues, I guess there
21 was -- I think the most recent letter, Mr. Ricco, was from you,
22 where you had thrown out the possibility of allowing parties to
23 brief the *Curcio* issues.

24 I know Ms. Feinzig had, in her submission, talked
25 about maybe submitting some proposed questions, which I sort of

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1 took to be in the category of briefing or basically written
2 submissions that would address the contours of the hearing,
3 which I think makes sense, but only if everybody is willing to
4 do it expeditiously. I don't know if you want to add anything
5 to that.

6 And then, Mr. Barket, of course, I'll be happy to
7 entertain your response.

8 MR. RICCO: Judge, nothing to add to it. We've been
9 preparing for today, so we could have the submissions to the
10 Court very expeditiously.

11 THE COURT: Okay. All right. I assume, Ms. Feinzig,
12 you can do the same.

13 MS. FEINZIG: Yes, your Honor.

14 THE COURT: Okay.

15 Mr. Barket.

16 MR. BARKET: Same for us.

17 THE COURT: So is a week enough time to submit
18 whatever people want to submit, whether it's legal stuff on the
19 contours of this proposed questions? Does that give everybody
20 enough time?

21 MR. RICCO: Yes.

22 THE COURT: I don't want people to be reckless,
23 either. I don't want speed to be at the expense of
24 thoroughness.

25 MR. BARKET: In terms of questions, a week is plenty

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1 of time.

2 THE COURT: Okay.

3 MR. BARKET: Can I suggest that we perhaps set a --
4 today is Wednesday -- so an interim date of Monday where
5 everybody can kind of swap proposed questions to each other?

6 THE COURT: Sure.

7 MR. BARKET: And then hopefully, settle in on some
8 rough set of things, questions the Court will actually ask.

9 THE COURT: Okay. And then, to the extent, and I
10 don't know, Ms. Feinzig, your letter wasn't clear on this
11 because you did not have Mr. Ricco's letter at the time you
12 wrote yours, whether a week is enough time to the extent you
13 want to add legal analysis to whatever it is he's going to be
14 proposing.

15 I'm looking at you, Mr. Ricco, and you, Ms. Feinzig.

16 MS. FEINZIG: I think it's enough time for the
17 government, your Honor.

18 MR. RICCO: That's enough time, Judge.

19 THE COURT: All right. And I think what would be
20 helpful in your letter is a suggestion as to how long you think
21 this might take. I don't think it should take more than a day.
22 I think it should take less than that, but I'm not going to
23 schedule a bunch of other cases, just because I want to be
24 optimistic that we'll get it done in a couple hours. So the
25 ERISA world will have to wait for their cases to be heard.

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1 MR. RICCO: My sense is the inquiry that needs to
2 happen will take a day.

3 THE COURT: Okay. I figured a day would be what we
4 would block out. I don't think we would need more than that.

5 MR. BARKET: No, Judge.

6 MR. RICCO: Okay.

7 THE COURT: All right. Other issues people want to
8 raise?

9 MR. WRIGHT: With respect to the wall privilege
10 review, as your Honor I believe is aware, there was a
11 contraband cellphone that was seized that was forensically
12 searched by the Bureau of Prisons, resulting in two extraction
13 reports: one that related to the cellphone itself, one that
14 related to a SIM card in the cellphone.

15 Those reports are each of approximately 20 pages.
16 The government provided them to all counsel at the end of
17 January. And I asked counsel at that time to convey whether
18 they intended to claim any privilege over any of it.

19 I understand, your Honor, that Mr. Barket views that
20 there may be a privilege that he wishes to assert here on
21 behalf of his client. The government's view, your Honor, is
22 that there is nothing here over which a privilege could be
23 asserted, with the exception of, quite literally, nine text
24 messages that appear in the extraction report for the SIM card.

25 I am not assigned to this case in its substance. I'm

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1 not in a position to assess whether or not those are
2 privileged. They do not appear facially to be of a nature of a
3 communication that could be, but I defer to counsel if there's
4 a privilege they wish to assert.

5 With the exception of that, your Honor, there simply
6 is no communication in these reports that could possibly be
7 privileged. There is an issue that was raised, I think fairly,
8 by Mr. Barket, and that is that the extraction reports refer to
9 a number of files that exist on the cellphone and the SIM card.

10 After speaking with people in the BOP, as well as our
11 own forensic analysts, it appears that these are files that are
12 not reflective of user activity, but rather system files that
13 come with any kind of computer or any chip or processing unit
14 of a computer in order to allow it to work. We are, however,
15 taking the steps to acquire the cellphone. It's now in New
16 York. It is available if counsel would like to look at it.

17 With that said, I don't think that there's any reason
18 why these two extraction reports, which do capture all of the
19 data on the phones that can be rendered into plain English with
20 dates and times or numbers, communications of which there are
21 just nine text messages, I don't think there's any assertion of
22 privilege that could lie there. And if Mr. Barket thinks
23 otherwise, I would ask him to assert the privilege now.

24 THE COURT: So with respect to these two extraction
25 reports as you're calling them, I obviously haven't seen them,

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1 so what's on them? I gather there are nine -- is it separate
2 text communications or a total of nine communications?

3 MR. WRIGHT: There are, on the SIM cards report,
4 which is approximately 20 pages long, there are nine text
5 messages, as in one text from a user to the phone or from the
6 phone to a user, that's one text of which there are nine.
7 There are then records of contacts on the phone; calls in and
8 out, which, I think, again, by their nature, are not something
9 over which privilege could be asserted.

10 THE COURT: Uh-huh.

11 MR. WRIGHT: And for that reason, I think it would be
12 productive, and I think this exercise is at its natural end,
13 for counsel to assert a privilege if they see one, and if they
14 do, we'll respond and argue to the Court.

15 THE COURT: Mr. Barket.

16 MR. BARKET: Simple from my perspective, Judge. I
17 want to see the whole before I articulate a position on the
18 part. So I haven't seen the report. I've seen the text
19 messages. I want to see the phones and the files, the system
20 files, there's a dozens, I think, of -- what was the phrase you
21 used to describe those?

22 THE COURT: System files.

23 MR. WRIGHT: -- system files, your Honor, in the
24 sense they're not reflective --

25 THE COURT: -- of the usage of the phone.

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1 MR. BARKET: Our expert looked at that and said I
2 can't tell from looking at this whether they're simply system
3 files or they represent substance that can be extracted, so in
4 other words, whether or not there could be text messages. And
5 we'd like to look at the phone and the SIM card. And at the
6 end of that, we'll have seen the whole and I can articulate a
7 position as to the part, which is the reports that they want to
8 hand over.

9 MR. WRIGHT: As I said, your Honor, we're happy to do
10 that. We've taken the steps. We have the phone, which I
11 confirmed earlier today. I'm happy to have a forensic analyst
12 on behalf of the defense analyze it in the presence of our own
13 experts and staff.

14 With that said, there is absolutely no bearing
15 whatsoever of what those system files are with respect to an
16 assertion of any privilege over these reports. As I had
17 posited to counsel in our discussion of the issue, there could
18 be a recording that is hiding amidst these files, perhaps,
19 let's hypothesize, that is a recording of a literal
20 conversation between the defendant and his counsel in which
21 there is a request for legal advice that is provided regarding
22 the heart of this case. If that were the case, there's still
23 nothing about these reports that would be privileged since they
24 do not in any way betray anything about these files other than
25 a file name that is incomprehensible to any lay or expert --

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1 layperson or expert on the issue.

2 So I would like to make the extraction reports
3 available to the government --

4 THE COURT: Except that one of the reports contains
5 the substance of the text messages, right?

6 MR. WRIGHT: That's correct, your Honor.

7 THE COURT: Yes.

8 MR. WRIGHT: And if counsel is prepared to assert a
9 privilege over those texts, there's certainly no access to
10 additional material that I think bears on those texts. If they
11 are a request or a provision of legal advice in some way that I
12 don't perceive, assert a privilege and we'll respond to it.

13 THE COURT: So the proposal is to turn over the two
14 extraction reports, which your point is, even if there's,
15 somewhere buried in the phone, some conversation, you're not
16 turning over the phone itself to the prosecution team; you're
17 turning over the extraction reports and we'll have a
18 conversation about the text messages.

19 So either the whole report gets turned over or a
20 redacted version that takes out the text messages will get
21 turned over, right?

22 MR. WRIGHT: And your Honor, again, if counsel has a
23 view that these text messages --

24 THE COURT: No, I understand that. I'm saying,
25 that's what we're left with, is either both reports in their

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1 entirety get turned over, or one report that has the text
2 messages may get redacted, but we'll wait and see what the
3 privilege assertion is.

4 MR. WRIGHT: Precisely.

5 THE COURT: Okay.

6 Mr. Ricco.

7 MR. RICCO: Judge, on this issue, I think the prudent
8 thing is reflected in Mr. Barket's request. I've had an
9 opportunity -- Mr. Barket has used the word "our expert." I
10 don't know who that person is. But the defendant services
11 computer litigation support unit, which assists us in capital
12 trials, I've had the occasion to discuss this issue with them,
13 and they have given me a program called Cellbright. And that
14 program will oftentimes reveal text messages that are in those
15 hidden files, that it does have it, that is not unreasonable to
16 think that there may be something in them.

17 THE COURT: Okay.

18 MR. RICCO: So I can understand why one would be
19 reluctant to weigh-in on the issue of privilege without having
20 an opportunity --

21 THE COURT: It would just be a question of
22 weighing-in on what's in the extraction reports. The fact that
23 there might be other data that could be extracted from the
24 phone is why precisely the phone should be made available to
25 you and to others and their experts.

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1 MR. RICCO: I don't disagree with that.

2 THE COURT: That's all I'm saying.

3 MR. RICCO: I don't know -- I didn't -- I'm not aware
4 of the context of those communications, so I don't know whether
5 or not there is text information embedded in the device that
6 does relate to one or more of those conversations.

7 Now I don't disagree with the government. These text
8 messages, on their face, I don't know any privilege that would
9 support them.

10 THE COURT: Whatever it is, and we can agree to a
11 process by which Mr. Barket can assert the privilege and
12 evaluate it --

13 MR. RICCO: Yes. And Judge, this --

14 THE COURT: Let me just finish.

15 MR. RICCO: Go ahead.

16 THE COURT: I think what we're talking about here is
17 the disclosure of the reports themselves. So even if the phone
18 might have other data that could itself be privileged, the
19 prosecution team isn't going to see that in the first instance
20 anyway.

21 MR. RICCO: Judge, I don't want to change the point,
22 but I just want to finish my point.

23 THE COURT: Go ahead. Finish your point. And then
24 I'll hear from Mr. Barket.

25 MR. RICCO: This process to review these files takes

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1 about an hour, Judge.

2 THE COURT: Okay. Gotcha. You're talking about
3 having the text person exploit the phone, takes about an hour.
4 That's the program you were mentioning?

5 MR. RICCO: Yes. Basically that it inputs those
6 files into this program, and that program then prints out
7 information.

8 THE COURT: Presumably that program would have been
9 available to BOP and they would have used that program, but
10 maybe I'm naive.

11 MR. WRIGHT: That's correct. Again, I think out of
12 respect, and given the nature of the proceedings, we are
13 permitting every avenue here to be exhausted. All files and
14 data that on these cellphones can be rendered into meaningful
15 English language or numbers that have meaning was done by
16 running this program.

17 With that said, it's important to take every
18 precaution. Certainly not proposing to do anything with this
19 phone with respect to my colleagues who are assigned to this
20 case, that the reports themselves, your Honor, there simply is
21 no basis over which to assert privilege over them, except with
22 the possible respect to those text messages. And I think if
23 that were the case, I think Mr. Barket and learned counsel
24 would have straightforwardly made that claim with respect to
25 them. So at this time, I do respectfully ask to turn the

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1 reports over.

2 THE COURT: Okay. Mr. Barket.

3 MR. BARKET: I didn't know it was only an hour. And
4 our expert is indeed our expert. It's the person or the
5 company that we've been --

6 THE COURT: Be that as it may --

7 MR. BARKET: What I said at the beginning, I just
8 want to look at the whole before I --

9 THE COURT: But this has got nothing to do with
10 whether the reports themselves contain privileged information.

11 MR. BARKET: It actually --

12 THE COURT: No, it doesn't, it doesn't. It just
13 doesn't. Either the texts are privileged or they're not. I
14 don't know how the other data could at all be privileged, but
15 whatever it is, if there's something in the phone itself that
16 could be privileged, you certainly should have an opportunity
17 to see that, but the proposal isn't to turn the phone over to
18 the prosecution team; it's to turn the reports over.

19 MR. BARKET: I understand, Judge.

20 THE COURT: Okay.

21 MR. BARKET: I don't disagree with anything that
22 anybody said. And ultimately, and maybe even quickly, we'll
23 get to exactly that point. My position is, I'm not asserting
24 privilege over these text messages that have been disclosed.

25 I do -- in a perfect world, from Mr. Tartaglione's

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1 perspective, I would not like these text messages delivered to
2 the government, in a perfect world. I get that I don't live in
3 that world.

4 THE COURT: In perfect world, he wouldn't have used
5 the phone.

6 MR. BARKET: Well, yeah.

7 So part of our obligation is to try and develop a
8 meritorious argument as to how those text messages could be
9 privileged. And I have a thought on it, an idea on it. It's
10 to -- I don't have enough information to assert it, but I don't
11 know why we would need to do that first. If it's --
12 everything's available. We have an expert that's already being
13 paid for through this process, through the courts, who is
14 available to examine the phone. Let us look at the phone, the
15 whole, first. And if we can't assert a privilege, which may
16 very well be, then we don't assert the privilege and we say
17 that.

18 If we do develop an argument to assert the privilege
19 and the material has already been turned over to the
20 government, then it's too late.

21 THE COURT: You definitely get a chance to argue why
22 information in the reports themselves is privileged and
23 shouldn't be turned over to the prosecution team, but the
24 reports say what they say, and the text messages that are in
25 those reports say what they say.

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1 I don't know. I guess from the government's
2 perspective, what's the rush? If this isn't going to take very
3 long to do, whether it's an hour or a day, Mr. Wright, I'm not
4 sure why that matters from the prosecution team's perspective.

5 MR. WRIGHT: We're happy to proceed as the Court
6 prefers. I think the attorney/client privilege is a
7 multifaceted and complex area of the law. With that said, it
8 is not infinitely elastic and there are arguments that can be
9 made that are within the zone of reason and possibility.

10 If these text messages are what concern the parties,
11 I would propose in that case redacting them and providing the
12 balance of the report, which I think if I understand counsel
13 correctly, I don't think that there's any claim that any of
14 that remainder of the report could present an issue.

15 THE COURT: Right. But if the prosecution team gets
16 a redacted report tomorrow and then it turns out there's
17 litigation over the text and it turns out they're not
18 privileged and counsel have an opportunity to have their own
19 experts exploit the phone and the prosecution team gets the
20 reports two weeks from now, what's the prejudice to the
21 government?

22 MR. WRIGHT: I'm in the strange position of not
23 knowing the significance of, for instance, the call logs or
24 the --

25 THE COURT: I understand you may not know the

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1 significance of the call logs. I guess I'm trying to
2 understand, what's the significance of the timing of discovery
3 of the significance of the call log?

4 MR. WRIGHT: I take your point, of course. I think
5 because I'm in a place of ignorance as to the possible
6 significance of the contacts or the lists of calls to numbers,
7 I don't know whether receiving that information now, given that
8 we're in the context of requesting a trial date, could be
9 material to the government.

10 THE COURT: The trial date request has been a
11 proforma thing that the government has done at every
12 conference, which everybody understands why they're doing that.
13 The trial date hasn't been set. It's not going to be set.
14 Even if we set the trial date tomorrow, the trial won't happen
15 anytime in the immediate future because there's a whole bunch
16 of motion practice to be done, among other things.

17 MR. WRIGHT: Again, coming from a place of ignorance
18 and not knowing what the investigative value of these messages
19 are and what the investigative lengths that might be needed to
20 exploit their value for the government lawfully, I'm in a
21 position of certainly wanting to respect the possible claim of
22 a privilege and would redact the report, but I just don't see
23 how any of the remainder of it could in any theory of privilege
24 be privileged, and given my role, would seek to provide it to
25 the government.

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1 THE COURT: And it may very well be it's a role you
2 would gladly be done with, if you could. But I think if we say
3 to the defense, we'll give you two weeks, get your expert
4 access to the phone, give you a chance to write something if
5 you want to assert a privilege, I don't see how that's going to
6 prejudice the prosecution team, especially since we don't have
7 a trial date. And whether it takes an hour or it takes a day,
8 I don't think you're going to need more than two weeks to get
9 the data and then explore what privilege can be asserted.

10 Does that seem fair, Mr. Barket?

11 MR. BARKET: Absolutely.

12 THE COURT: Mr. Ricco, you okay with that? You might
13 want to go faster, but you don't have a problem with that?

14 MR. RICCO: I'm not interested in going faster.
15 There may be proposed questions with respect to *Curcio*, but we
16 can do left hand/right hand at the same time.

17 THE COURT: No, I mean I do recognize that, quite
18 apart from whether or not the report has privilege
19 information -- or reports -- quite apart from whether the
20 reports have investigative leads for the prosecution team or
21 not, the reports are going to be relevant to the *Curcio*
22 inquiry, but again, I think Mr. Barket's point is well-taken
23 that if he thinks that exploring the other data on the phone
24 that may not have made its way into the reports could help
25 inform an analysis of whether or not there's a privilege, then

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1 he should be entitled to that.

2 MR. RICCO: Judge, I wholeheartedly agree with that.

3 THE COURT: And it may be that then you'll be
4 submitting supplemental questions depending on what happens to
5 the reports.

6 Have you seen the reports, Ms. Feinzig? You haven't,
7 right?

8 MS. FEINZIG: No.

9 THE COURT: Right.

10 So they're walled-off from not only the prosecution
11 team, but also the government's other wall.

12 MS. FEINZIG: But I don't see any reason why I should
13 be walled-off from the content of the phone.

14 THE COURT: Well, if it's attorney/client privilege,
15 then --

16 MS. FEINZIG: Theoretically, the other information
17 I've reviewed was attorney/client privilege. I'm not saying
18 it's necessary; it just might move things along faster in terms
19 of the questions that we propose for the *Curcio*, but also, it
20 can wait and I can supplement.

21 THE COURT: Okay.

22 MR. BARKET: I, speaking just for the lower L part of
23 the table here, don't have a problem with -- and I thought the
24 Court ordered this on January 22nd, but if not, then with
25 Mr. Wright sharing the reports with Ms. Feinzig, the same --

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1 because the same -- I've got no problem with that.

2 THE COURT: Mr. Ricco, you don't have a problem with
3 that, do you?

4 MR. RICCO: None whatsoever.

5 THE COURT: Okay.

6 There you go, Mr. Wright. You finally get a friend
7 in this case.

8 MR. WRIGHT: Shared.

9 THE COURT: You're no longer alone. All right.

10 Next?

11 MR. BARKET: Are you still looking for vanilla,
12 Judge, because I'm still all out of that.

13 THE COURT: What's that? No, I get it. There's no
14 more vanilla.

15 MR. BARKET: There were a few things that we brought
16 up last time that we're attending to. Visiting the jail, as
17 you might have read, is an issue these days. So I have a
18 note -- I received a note yesterday from counsel to the MCC,
19 Ms. McFarland, I believe, who said that, give us the names of
20 the people you want to view the cells and evidence, we'll get
21 to that, but not until after the current situation has
22 resolved.

23 If you don't know, the jail has been locked down for
24 a week for some security investigation, rumors of which I've
25 heard, I'm reluctant to repeat in open court, but so the jail

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1 has been locked down for a week. Nobody -- no movement, no
2 legal visits, no social visits.

3 THE COURT: Is there an expectation as to how long
4 that will continue?

5 MR. BARKET: Actually, not a good one, because I was
6 looking for a social visit for his family on Thursday,
7 tomorrow, yesterday, and I was told unlikely that we're going
8 to resolve things by then. And from -- the first time I saw
9 Mr. Tartaglione was today in about ten days, two weeks. And my
10 understanding is that they're still locked down and that's not
11 going to change for a bit.

12 THE COURT: Do you have any idea, Mr. Swergold, how
13 long?

14 MR. SWERGOLD: Your Honor, I don't. So the record is
15 clear, it's been locked down since Thursday. So I know when
16 Mr. Barket says he hasn't seen his --

17 THE COURT: So, February 27th?

18 MR. SWERGOLD: Yes. When he says he hasn't seen his
19 client in ten days to two weeks, not all of that is because of
20 the lockdown. All I can say is that, yes, we are aware that
21 the MCC is dealing with a serious security issue. We are
22 monitoring it. We are in regular contact with the MCC. And we
23 also understand that Chief Judge McMahon is aware of the issues
24 and is monitoring it and is in contact with respective
25 institutional players within the system.

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1 MR. RICCO: For what it's worth, Judge, the
2 investigation is expanding, not contracting.

3 THE COURT: So it may be a while?

4 MR. RICCO: Yes.

5 THE COURT: All right. Well, I mean, I'm not sure
6 what's to be done about it now, Mr. Barket, but obviously if --
7 the longer it goes, maybe the more problematic it would be.
8 And I'm sure MCC understands the urgency to try to do whatever
9 they're going to do, but at the same time, allow for visits as
10 soon as they can, and I'm sure the Chief Judge is more than an
11 advocate for that point, so I'm not going to get in her way.

12 Other issues.

13 MR. RICCO: Judge, I did have one issue. It's a
14 purely *ex parte* defense. It's one of the prongs of the letter,
15 very simple and narrow issue, and I would not want to do that
16 in the presence of the government or any of the firewall
17 counsel at this time, but of course the letter recognizes,
18 based upon your Honor's ruling, the information would be
19 provided to firewall counsel and we made that request as a part
20 of the letter.

21 THE COURT: Yes. I think there's a couple things we
22 need to discuss *ex parte*. So, what we could do is tentatively
23 schedule the next conference to be the *Curcio* hearing,
24 tentative in the sense that we'll see how things play out with
25 privilege assertions and anything else that comes out up. So

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1 because everybody seems to think that a day is what's going to
2 be necessary, we're going to have to find a date that works for
3 everyone.

4 The complication for us is we actually have a trial
5 scheduled in April that we think is going to go, but you
6 know...

7 Does Thursday, April 30th, work for everybody?

8 MR. SWERGOLD: Just for clarity, is there anything
9 that's going to happen at this that would require Ms. Comey and
10 I to be here, or is it purely a *Curcio* hearing where I imagine
11 we would not be present?

12 THE COURT: Well, there might be other issues we
13 could address.

14 MR. SWERGOLD: Okay.

15 THE COURT: So you can hang out in your offices in
16 the building, and if we need you, we'll call you.

17 Is that okay?

18 MR. SWERGOLD: No, we're just trying to figure out if
19 we need to come up or not.

20 THE COURT: If issues come up -- if we finish the
21 *Curcio* hearing and it turns out there are other things we need
22 to address, it would be useful to have one of you here.

23 Is that okay?

24 MR. SWERGOLD: Okay.

25 MR. BARKET: I guess you've exhausted the dates

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1 between --

2 THE COURT: Yes.

3 MR. BARKET: -- the 11th?

4 THE COURT: We were hoping to find out if this trial
5 was going to go or not, but we just don't know at this point,
6 so we have to assume it is.

7 MR. BARKET: I hate to suggest such a thing, but is
8 it possible to take a day off from the trial?

9 THE COURT: No, I'm not going to do that.

10 MR. BARKET: Okay.

11 THE COURT: Jurors and trials --

12 MR. BARKET: Just asking.

13 MS. COMEY: Your Honor, on April 30th, I expect to
14 be on trial, and AUSA Swergold will be out of the state. If
15 your Honor needs one of us available, we would ask for a
16 different date unless your Honor can excuse our presence.

17 THE COURT: I mean, it's really up to you. For the
18 *Curcio* hearing, you're obviously unnecessary and, frankly, not
19 invited, don't take it personally, and it could be that if
20 there are other issues we need to address, we can schedule
21 another conference and we can just do that. Otherwise, I don't
22 want to delay it. Obviously, there's an anxiousness to get
23 this done.

24 MS. COMEY: Yes, your Honor. We would rather have
25 the date scheduled sooner with the understanding that we may

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1 not be able to be available.

2 THE COURT: All right. That's fine.

3 Is there anyone who can't do that day otherwise?

4 (No response)

5 All right. We'll say on that the 30th, we'll start
6 at 10:00. So I guess in light of that, I think it might make
7 sense for the question submission deadline to get kicked back
8 again until we resolve the phone issue; that way, there's just
9 one set of questions with everything taken into consideration.

10 Does that make sense?

11 MR. BACHRACH: I'm sorry. I was going to say on the
12 last point briefly, if your trial goes away, then could we
13 possibly revisit an earlier date?

14 THE COURT: Yes. Sure. So why don't we say, then,
15 that the submission with the proposed questions and any other
16 legal guidance you want to provide -- well, let me ask you
17 this, Mr. Barket.

18 Do you think you need the full two weeks to deal with
19 the phone analysis and the privilege assertion?

20 MR. BARKET: The expert's from one of the Carolinas,
21 I forget which one, so it's just really scheduling. But it
22 seems like we have -- I'll do it, obviously, as quick as I can.

23 THE COURT: No. That's fine.

24 MR. BARKET: So two weeks is, I hope, more than
25 enough time. If we can get it done quicker, that's great.

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1 THE COURT: Why don't we say this? Why don't we say,
2 then, that the written submissions with the questions/legal
3 guidance we'll kick to March 27th. That gives you your two
4 weeks to get the phone issue -- get the phone analyzed and have
5 a privilege conversation.

6 If it turns out you're not going to assert a
7 privilege, then the March 27th deadline should be easy. If it
8 turns out that if you do assert the privilege, then we'll just
9 have to deal with it.

10 MR. BARKET: Right. Okay. And then exchange
11 questions a week before that on the 20th?

12 THE COURT: Sure. Okay. I'll get to speedy trial
13 clock in a second.

14 Is there anything else -- I know we have some *ex*
15 *parte* things to discuss. We'll do that, but is there anything
16 else for the prosecution team before we excuse them?

17 Mr. Swergold.

18 MR. SWERGOLD: Not from the government. Thank you.

19 MR. BARKET: Not from --

20 THE COURT: Not from defense.

21 The clock is already stopped because of the motions
22 that are pending, but any other objection to excluding time
23 from now until April 30th of this year?

24 MR. BARKET: No.

25 THE COURT: Okay. Then I'll prospectively exclude

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1 time from today until April 30th of this year, independently
2 finding it's in the interest of justice to do so.

3 As I said in addition to the motions, in addition to
4 this being a complex case, there are questions of
5 representation that have to be resolved by way of a *Curcio*
6 hearing. And so the interest of justice from this exclusion
7 outweigh Mr. Tartaglione's and the public's interest in a
8 speedy trial. The finding is made pursuant to 18 U.S.C.
9 Section 3161(h) (7) (A).

10 If we could now clear the courtroom of the
11 prosecution team and everybody who is not otherwise affiliated
12 with the defense team or -- I think, Ms. Feinzig, you're gone,
13 too, for now. If we need you, we'll call you.

14 MS. FEINZIG: Thank you.

15 MR. WRIGHT: Thank you, your Honor.

16 THE COURT: You want to keep her here?

17 Hang on, Ms. Feinzig.

18 MR. BARKET: It's up to Mr. Ricco.

19 MR. RICCO: No. I don't think it's an issue. I set
20 forth in the letter, I think at the end of the issue --

21 THE COURT: You may want to disclose.

22 MR. RICCO: -- we'll share a letter with her, send
23 her request, built in.

24 MS. FEINZIG: A request for a letter that was already
25 submitted?

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1 MR. RICCO: Yes. Today.

2 MS. FEINZIG: Oh, okay.

3 MR. RICCO: Yes, that's what I'm talking about.

4 THE COURT: Okay.

5 (Pages 30 through 67 sealed by order of the Court)

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